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No. 79-1689

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Appellant,

vs.

HUBERT L. WILL, et al.,
Appellees.

On Appeal from the United States District Court for The Northern District of Illinois.

MOTION TO AFFIRM OR IN THE ALTERNATIVE TO HOLD UNTIL DISPOSITION OF CASE NO. 79-983

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JURISDICTION

While appellees believe that the issues in this case may be resolved without necessarily reaching the constitutional question, they agree with appellant that this Court has jurisdiction to hear the issues of statutory construction as well as the constitutional issues presented in this case. Appellees also agree with appellant that the Justices of this Court are not disqualified from participating in the disposition of this case by the provisions of 28

U.S.C. § 455, and that § 455 in no way limits or otherwise affects the jurisdiction of the Court to hear and decide this case. (See Pp. 8-13, infra). Appellees further respectfully submit that the questions presented in this appeal are not substantial and may be resolved by Motion to Affirm, the judgment of the district court being so obviously correct that further review or argument is not warranted. In the alternative, appellees respectfully submit that the Court should hold this case until disposition of Case No. 79-983. If the decision of the district court in that case is affirmed, that disposition will necessarily resolve all issues presented in this case and this case may be affirmed without further argument.

STATEMENT

This case was decided by the district court on cross-motions for summary judgment. Both sides agreed that there were no genuine issues of material fact. Appellant's answer in the district court admitted all essential fact allegations of plaintiffs' complaint and disputed only the legal conclusions drawn therefrom.

This case is brought by fourteen federal judges on their own behalf and on behalf of all judges of the United States Courts, challenging Congress' refusal to appropriate funds for fiscal 1979 and fiscal 1980 for the payment of annual cost-of-living adjustments to which all judges are statutorily entitled.

Congressional actions in witholding funding for cost-of-living adjustments due judges for fiscal 1977 and fiscal 1978 are the subjects of *United States* v. *Hubert L. Will, et al.*, 79-983 (*"Will I"*). The reduction of judicial compensation in fiscal 1980 is one of the issues presented in

William Foley v. *James E. Carter* (Civil Action No. 79-3063, D.D.C.).[1]

The compensation of a federal district judge is defined in part at 28 U.S.C. § 135[2] as follows:

> Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title [i.e., the Executive Salary Cost-of-Living Adjustment Act].

The Executive Salary Cost-of-Living Adjustment Act,[3] adopted in 1975, ("Adjustment Act") provides that the salaries of certain federal employees, including judges shall be adjusted annually in an amount measured by the average adjustment in General Schedule salaries as determined under the Federal Pay Comparability Act of 1970 [hereinafter the "Comparability Act"], 5 U.S.C. § 5305, et seq. These percentage adjustments are submitted to Congress by the President, and for judges, become payable without further action by Congress on October 1 of each year (the first day of the fiscal year), unless within 30 days of their submission either House of Congress adopts a resolution disapproving the President's report.[4] However, in each of the past four years

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[1] That case challenges the reduction on behalf of all affected officers and employees of the Judicial Branch. On March 24, 1980 the district court held that the purported reduction did not apply to the Judicial Branch and granted motions of plaintiff and Intervenors (Appellees here) for summary judgment.

[2] Similar provisions apply to the compensation of other Article III Judges. See 28 U.S.C. §§ 5, 44(d), 213, and 252.

[3] See Jurisdictional Statement ("J.S.") Appendix 14a-15a.

[4] In which case the President must follow the recommendations of the Advisory Committee on Federal Pay. 5 U.S.C. § 5305(c)(2).

Congress has withheld funds sufficient to pay the adjustment. Thus, although judges' salary levels have been adjusted upward each year since 1975 as required by the applicable provisions of the Adjustment Act, Congress has refused to pay the full amounts provided by law. Only the first adjustment in the amount of 5% for fiscal 1976 (effective October 1, 1975) was paid. That adjustment, which marked the first increase in judicial compensation in more than six years, increased the salary of a district judge from $40,000 to $42,000.

As noted above, the actions of Congress in withholding funding for fiscal years 1977 and 1978 (commencing October 1, 1976 and October 1, 1977 respectively) are the subjects of *Will I,* No. 79-983. Its refusal to fund the fiscal 1979 adjustment (commencing October 1, 1978) and its refusal (on October 12, 1979) to appropriate funds for the full payment of fiscal 1980 salaries at the pay levels which even Congress conceded had become effective twelve days earlier, are the subjects of this case.

The Fiscal 1979 Adjustment

In October of 1978, all salaries under the Comparability Act were increased by an overall average of 5.5%. Funding for these adjustments was withheld for judges and certain other officers of the United States by virtue of a provision of the 1979 Legislative Branch Appropriation Act (Pub. L. 95-391, 92 Stat. 763) which provided in part for fiscal 1979:

> "No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the . . . judicial branch . . . at a rate which exceeds the rate

> . . . payable for such office or position for September 30 1978. . . ." (J.S. App. 22a)

Payment of the 5.5% salary adjustment for fiscal 1979 was thereby withheld from all federal judges. That limitation was temporary only and expired at the close of the 1979 fiscal year, *i.e.*, September 30, 1979.

Although the legality of this appropriations limitation, as it pertains to the salary payments to judges during fiscal 1979, is disputed, appellant has conceded in this case that judges became entitled to this adjustment effective October 1, 1979, at the latest.[5]

In its Jurisdictional Statement (See J.S. 6-7), appellant acknowledges that effective October 1, 1979, and at least until October 12, 1979 (when the "pay reduction act," Pub. L. 96-86, was enacted), judges were entitled to this 5.5% adjustment. Moreover, as will be discussed *infra*, p. 15, even the appropriations limitation contained in Pub. L. 96-86, which attempts to roll back salary levels, acknowledges that the fiscal 1979 adjustment became effective not later than October 1, 1979.

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[5] In its "Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment" filed in the district court, appellant states:

> The 1979 Pay Act was an appropriations measure expiring at the end of the fiscal year, and it extinguished the 1979 cost-of-living increase only during fiscal 1979 which ended on September 30, 1979. (p. 4, n. 3.)
>
> On October 1 the 1979 Pay Act expired, and those individuals subject to § 304(a), including . . . judges became entitled to the 1979 cost-of-living increase of 5.5%. (p. 11)

The Fiscal 1980 Adjustment

On August 30, 1979, the President submitted to Congress an adjustment of approximately 7% to become effective October 1, 1979. Appellant concedes that that adjustment went into effect on October 1, 1979. (J.S. 6-7, 14, 19, n. 11, and note 5, *infra*) Accordingly, on October 1, 1979, two events occurred. First, the limitation imposed under the 1979 Legislative Branch Appropriation Act, if ever valid as to judges, expired, freeing the 5.5% increase to become payable. Additionally, the fiscal 1980 adjustment of approximately 7% became payable. The aggregate of the 1979 and 1980 adjustments resulted in a total adjustment of 12.9% over the rates actually being paid judges prior to October 1, 1979. On October 12, 1979, Congress adopted Pub. L. 96-86 (J.S. App. 23a-26a), a Joint Resolution intended to provide appropriations for certain agencies, which included a proviso that, for the fiscal year 1980, "funds available for payment to *executive employees . . . who under existing law are entitled to approximately 12.9% increase in pay,* shall not be used to pay any such employee or . . . official any sum in excess of 5.5% increase in existing pay and such sum if accepted shall be in lieu of the 12.9% due for such fiscal year." (emphasis added).

In the Court below, plaintiffs (appellees here) contended that the limitations contained in the 1979 Legislative Branch Appropriation Act did not have the effect of altering or amending the statutory salary of judges, and that the adjustment of 5.5% for fiscal 1979 went into effect and became payable effective October 1, 1978. Appellees main-

tained that the fiscal 1980 adjustment went into effect and was payable as of October 1, 1979 (a fact which is not contested) and that the efforts of Congress to limit funding for that adjustment (if intended to apply to the judiciary) were invalid. Appellees also contended that, if either of these limitations did prevent the adjustments from taking effect, or if the pay reduction provision of Pub. L. 96-86 applied to judges, they were in violation of the Compensation Clause of Article III, Section 1 and were therefore unconstitutional.

The district court granted summary judgment in favor of appellees on both counts of the complaint, and entered judgment for fiscal years 1979 and 1980.[6]

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[6] In the *Foley* case (see p. 3, n.1 *supra*) the Director of the Administrative Office of the United States Courts sought declaratory judgment and mandamus relief in the United States District Court for the District of Columbia to compel the President to direct that the Director pay the appropriate (12.9%) increase to federal judges and other Judicial Branch employees. *Foley* v. *Carter*, No. 79-3063. On March 24, 1980 the district court granted motions for summary judgment presented by the plaintiff-director and by the appellees in this case who intervened in that case, holding that the fiscal 1980 limitation did not apply to the Judicial Branch.

ARGUMENT

I. The Justices of this Court are not disqualified in this case.

Appellees agree fully with the Solicitor General in his statement that this Court has jurisdiction in this case and that "the district judge and the Justices of this Court are not disqualified in this case." (J.S. 10 n.2)

All of the Justices of this Court are members of the classes in this action. Accordingly, this circumstance raises the potential application of the provisions of 28 U.S.C. § 455 which provides for the disqualification of any judge who has "a financial interest in the subject matter in controversy" or "is a party to the proceeding." See 28 U.S.C. § 455(b)(4) and (5)(i). However, because the outcome in this case necessarily will affect salary levels of all Article III Judges, every federal judge has the same interest in the controversy. This circumstance, of course, does not and cannot close the courthouse door to appellees. In many similar circumstances, our Courts, including this Court, have invoked the long established "rule of necessity" which provides that no judge is disqualified if there is no "disinterested" judge or forum available to decide the case. In this manner, litigants are insured that they will not be deprived of their right to the judicial process provided by law, and public interest considerations are protected through judicial review of significant constitutional questions. This subject was discussed at length in *Evans* v. *Gore*, 253 U.S. 245, 247-248 (1920), which involved a plaintiff-judge claiming that the federal government could not constitu-

tionally require an Article III Judge to pay income tax. That case was decided notwithstanding a statute which disqualified any judge who was "in any way concerned in any suit pending. . . ." 36 Stat. 1090 (1911). The *Evans* Court, discussing the question of disqualification, held:

> Because of the individual relation of the members of this Court to the question . . . we cannot but regret that its solution falls to us, and this although each member has been paying the tax in respect of his salary voluntarily and in regular course, but jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course. . . . In this situation the only course opened to us is to consider and decide the cause — a conclusion supported by precedents reaching back many years. 253 U.S. at 247-48.

Subsequently, the Court decided two other cases presenting similar issues. See *Miles* v. *Graham,* 268 U.S. 501 (1925) and *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939). After surveying the field, a leading authority on administrative law wrote in 1958 that *Evans* v. *Gore* still states the law on this subject. Davis, *Administrative Law Treatise* § 12.04 (1958).

The rule of necessity was more recently invoked in *Duplantier* v. *United States,* 606 F.2d 654, 662-63 (5th Cir. 1979); *Atkins* v. *United States,* 556 F.2d 1028, 1039-1040 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978); *Pilla* v. *American Bar Ass'n,* 542 F.2d 56, 58-59 (8th Cir. 1976); *United States* v. *Corrigan,* 401 F.Supp. 795 (D.

Wyo. 1975); *Turner* v. *American Bar Ass'n,* 407 F.Supp. 451 (N.D. Tex. 1975) and *Foley* v. *Carter, supra* (p. 3, n.1)[7]

In *Atkins,* prior to undertaking consideration of that case, the members of the Court of Claims submitted a certificate to this Court in which they expressed their belief that the disqualification statute, "taken literally, requires each of them to disqualify himself in these cases, because each has an interest in the subject matter of the controversy that could be substantially affected by the outcome of the proceeding." Plaintiffs' Brief On The Question Of Disqualification, App. p. 5a. (No. 75-1728). The Court of Claims Judges then stated that they were uncertain as to whether the pre-existing "doctrine of necessity" nevertheless permitted or required them to sit, as an "implied exception" to the disqualification statute. On that basis and before proceeding to hear and determine the *Atkins* case, the Judges asked the guidance and advice of this Court.

This Court then invited the parties in the case to submit briefs on the question certified by the Court of Claims. Pursuant to that invitation, the Solicitor General and the plaintiffs submitted extensive briefs, *both* concluding that neither the current disqualification statute nor any earlier version thereof was ever intended to abolish the well-established common law "rule of necessity" or to overrule the decisions of this Court and other federal Courts directly on point. It appears obvious that any attempt by Con-

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[7] The Supreme Court of California also recently invoked the "rule of necessity" in reviewing the rights of California Judges (including the Supreme Court) to cost-of-living adjustments under circumstances similar to those presented in this case. *Olson* v. *Cory,* ..... Cal. 3d ....., ... P.2d ..... (March 27, 1980). See p. 23 *infra.*

gress to do so would be an unconstitutional infringement upon the power of this Court to determine certain constitutional questions. Congress cannot lawfully foreclose access to the courts by citizens asserting the infringement of a basic constitutional right. See, *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968). Cf. *Boddie* v. *Connecticut,* 401 U.S. 371 (1970). Indeed, in his brief in the *Atkins* case, the Solicitor General agreed with the proposition that, if Section 455 was interpreted to prevent one class of litigants from seeking a judicial resolution of their claims, constitutional problems would arise.[8]

In *Atkins,* the Solicitor General also directly considered whether the vitality of the rule of necessity invoked in *Evans* v. *Gore* was in any way affected by the adoption of the current disqualification statute, 28 U.S.C. § 455, in 1974. After a review of the legislative history, he concluded that "nothing on the face of the statute or in its legislative history suggests any intent to change that long-standing doctrine." The Solicitor General added:

> To the contrary, statements in the committee reports and hearings expressly indicate that Section 455 was designed merely to establish objective criteria for selecting which among many qualified judges should preside over a lawsuit; there was no intention to abrogate the rule designed to cover the unique situation where all federal judges may technically be disqualified. (No. 75-1728, Memorandum of the United States, p. 6)

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[8] See No. 75-1728, Memorandum for the United States, p. 8, n. 5 citing Redish and Woods, "Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and A New Synthesis," 124 U. Pa. L. Rev. 45 (1975).

Our review of the legislative history of the current statute as well as its predecessors leads to the same conclusion, *i.e.*, there is no indication anywhere in the legislative history of Section 455 that it was intended to modify or overturn the long-standing doctrine of the rule of necessity.[9] In fact, the legislative history suggests a congressional intent to preserve the rule. Senator Birch Bayh, the author of the revised disqualification statute, testified that the changes effected in 1974 reflected the opinions of Professor John P. Frank. See Frank, "Disqualification of Judges: In Support of the Bayh Bill," 35 L. & Contemp. Prob. 43 (1970). Professor Frank's article recognized the "rule of necessity" as an integral part of any disqualification statute. (Id. at 44)[10]

Finally, appellees respectfully submit that any suggestion that the disqualification statute was intended to overturn the rule of necessity and forever close the door to appellees' claims would suggest consequences which go well beyond this case. Suppose, for example, Congress enacted a statute shortening every federal judge's term to 10 years, unless every judge is approved again by the Senate. Such legislation would obviously be unconstitu-

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[9] See Hearings before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, on S. 1064, July 14, 1971; May 17, 1973; S. Rep. No. 93-419 (93rd Cong., 1st Sess., 1973); H. Rep. No. 93-1453 (93rd Cong., 1st Sess., 1974); Debate: 119 Cong. Rec. Daily Ed. (Oct. 4, 1973, Senate); 119 Cong. Rec. Daily Ed. (Nov. 21, 1974, Senate); 120 Cong. Rec. Daily Ed. (Nov. 18, 1974, House).

[10] The Senate and House Reports also refer to Professor Frank's testimony. S. Rep. 93-419 (93rd Cong., 1st Sess. 1973, at p. 3); H. Rep. 93-1453 (93rd Cong. 1st Sess. 1974, at p. 3.)

tional; and yet, if no judge could hear the case, it would survive without challenge.

In short, 28 U.S.C. § 455 cannot be interpreted to bar the Justices of this Court from hearing the important claims presented in this case.

II. This case may be resolved on non-constitutional grounds.

The principal non-constitutional ground for upholding the appellees' right to pay adjustments is the fundamental proposition that an appropriation bill does *not* amend or repeal a statutory entitlement to salary. The right to a salary adjustment set by a previous statute remains unaffected and enforcible in a court of law. This is a basic, settled principle of federal statutory and appropriations law construction. As stated previously, on October 1, 1978 a salary adjustment of 5.5% went into effect for all federal employees, including judges. This adjustment was not paid to judges, however, because in adopting the 1979 Legislative Branch Appropriations Act on September 30, 1978, Congress included a proviso restricting the use of funds to pay these adjustments. See § 304(a)(1) of Pub. L. 95-391, quoted in relevant part at pages 4-5, *supra*.

The simple nonconstitutional issue presented in this appeal regarding that adjustment is whether this restriction on the use of appropriated funds, contained in an appropriations act, had the effect of repealing the Adjustment Act or otherwise altering the actual rate of judges' pay otherwise in effect. Appellees submit that the restriction merely withheld funds temporarily for the full payment of the lawful salaries of judges, without altering the judges' entitlement to those salaries.

Contrary to the contentions of appellant, appellees respectfully submit that there is no suggestion anywhere in the legislative history that Congress intended to *amend* existing laws. The comments from the debates quoted in the Jurisdictional Statement (see page 13, n.5) relating to "pay freeze" and "holding down increases" and imposing "caps" indicates an intent to *withhold* funds through an appropriation measure, and not an intent to amend existing laws. Indeed, had Congress intended to repeal or amend the Salary Act or the Adjustment Act, it would have said so, bearing in mind the repeated admonitions of this Court that "the intention of the Legislature to repeal must be clear and manifest." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936), as "repeals by implication are not favored," *Morton* v. *Mancari,* 417 U.S. 535, 549 (1974), and "the policy [against repeals by implication] applies with even greater force when the claim to repeal rests solely on an appropriations act." *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 190 (1978).

If the effect of the nonpayment proviso was merely to restrict the use of appropriated funds (thus deferring the payment of an admitted monetary obligation of the United States) rather than to amend or repeal the salary Act or the Adjustment Act, it follows that the judges' claim for full payment of that debt survives. Numerous cases have held that a limitation in an appropriations bill does not have the effect of repealing or even suspending an existing statutory obligation. *Gibney* v. *United States,* 114 Ct. Claims 38 (1949); *Lovett* v. *United States,* 66 F.Supp. 142 (Ct. Claims 1945); *Andrew Geddes* v. *United States,* 38 Ct. Claims 428 (1903); *Byron Brown Ralston* v. *United States,* 91 Ct. Claims 91 (1940), *cert. denied* 311 U.S. 687 (1940); *New York Airways, Inc.* v.

United States, 369 F.2d 743 (Ct. Claims 1966); and *State of Louisiana* v. *Weinberger,* 369 F.Supp. 856, 860 (E.D. La. 1973).

That the limitation contained in the 1979 Appropriations Act did not amend or repeal the Salary Act or the Adjustment Act or in any way alter the rate of judges' pay is clearly demonstrated by the following:

1. In adopting Pub. L. 96-86 (fiscal 1980) (J.S. App. 23a-26a) Congress itself acknowledged that the limitation in the 1979 Appropriations Act (Pub. L. 95-391) was temporary only. The 5.5% adjustment effective October 1, 1978 was a part of the "12.9% increase in pay" to which Congress acknowledged judges were already entitled when Pub. L. 96-86 was adopted on October 12, 1979. By its explicit recognition of federal judges' entitlement to the October, 1978 cost-of-living adjustment, Congress has clearly declared that the fiscal 1979 limitation on the use of funds was restricted to that fiscal year and did not affect the actual 5.5% adjustment in salary levels.

2. In issuing Executive Order 12087 on October 7, 1978, the President officially advised that judicial salaries were adjusted to the stated levels under the provisions of the Salary and Adjustment Acts.[11] Executive Order 12087 bears an asterisk after the adjusted salaries, however, with the caveat that "pursuant to the Legislative Branch Appropriations Act of 1979, *funds are not available* to pay a salary at a rate which exceeds the rate in effect on September 30, 1978." (emphasis added.)

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[11] Federal Register Volume 43 No. 197 Wed., October 11, 1978, Schedule 7 at p. 46829.

3. The Office of Personnel Management, through OPM letter 531-54 dated October 12, 1979, determined that Section 304 of P.L. 95-391 was merely a "restriction on the use of appropriated funds to pay increases in pay to certain federal officers. . . ." The OPM letter concluded that because this was merely a restriction on the use of appropriated funds, the lawful rates of pay established by Executive Order 12087 became payable on October 1, 1979, after the temporary restriction in Section 304 "expired."

4. Most significantly, for purposes of the instant case, the Solicitor General has conceded in this Court as well as in the district court that the limitation in the 1979 appropriations act was temporary (at best) and expired on October 1, 1979 the end of the fiscal year. (See p. 5, n.5 *supra,* and J.S. 6-7)

5. The Acting Comptroller General of the United States, in interpreting similar language in the 1977 Legislative Branch Appropriations Act, P.L. 94-440 (see Congressional Record—Senate, September 22, 1976, S. 16459-60) has expressed the view that such restrictions in an appropriations bill constitute only limitations on the use of funds and that the true salary includes the adjustment.

6. The authoritative legal publications listing judicial salary levels do so in the *adjusted* amounts. See e.g., West Publishing Co. 1979 Ed., Federal Rules, Civil Procedure, Evidence and Appellate Procedure, 28 U.S.C. § 135. However, consistent with Executive Order 12087, a footnote advises the reader that funds are not available to pay the full rate.

7. Both Houses of Congress have promulgated rules against the amendment of existing substantive legislation in appropriation bills. *See Tennessee Valley Authority* v. *Hill, supra.*

8. There exists a well-established presumption against the implied repeal or suspension of existing legislation, particularly when the claimed repealer rests solely on an appropriations measure. *Tennessee Valley Authority* v. *Hill, supra.*

While it is clear that the 1979 Appropriations Act did not repeal the 5.5% adjustment, appellant's contention that the fiscal 1980 appropriations provision, Pub. L. 96-86, was intended to serve as a substantive amendment to the Salary Act or Adjustment Act is even more tenuous. Like the restriction found in Pub. L. 95-391, the "cap" contained in Pub. L. 96-86 is merely a restriction on the use of appropriated funds for a single fiscal year. It is not, as appellant suggests, substantive legislation which effectively superseded appellees' right to the statutory adjustment. Indeed, Pub. L. 96-86 is even less characteristic of substantive legislation than the fiscal 1979 enactment. Continuing resolutions of Congress are familiar devices to provide temporary appropriations for departments and agencies which require authority to spend at the same level provided in a prior fiscal appropriations. Joint Resolution 412 (Pub. L. 96-86) was adopted to provide continuing appropriations for fiscal 1980 for a number of federal agencies whose prior appropriations had terminated with the close of the fiscal year on September 30, 1979. This was *not* the case for the judiciary. Judicial Branch appropriations for fiscal 1980 had already been approved, on September 24, 1979, (Pub. L. 96-68.) No. special appropriation for the judiciary was needed. By the time the Joint Resolution was adopted on October 12, 1979, judges were already being paid under the previously enacted appropriations act. The resolution limiting use of funds applied to those other agencies that required funding.

There is still an additional reason, however, why the limitation on the use of funds contained in Pub. L. 96-86 does not apply to judges. That Act specifically refers to, "funds available for payment to *executive employees, which include members of Congress* who under existing law are entitled to approximately 12.9% increase in pay, ..." (emphasis supplied) On its face § 101(c) does not refer to the Judicial Branch. In *Foley* v. *Carter* (See p. 3, n.1 and p. 7, n.6 *supra*), the Court so held. In *Foley* v. *Carter* the district court rested its conclusion on a number of persuasive facts. First, § 101 (c) on its face does not purport to repeal or amend the Adjustment Act as it applies to the Judicial Branch. (On the contrary, it acknowledges that there had been an increase of 12.9% effective October 1, 1979) Second, the Act does not purport to revoke or in any way amend or alter the Judicial Branch Appropriations Act of 1980 which provided funds for judicial salaries without restriction. Third, the Act makes no reference to the Judicial Branch although it does refer to Executive employees and members of the Legislative Branch. (By contrast earlier pay-freeze provisions named the Judiciary when limiting payment of full salaries of Judicial Branch employees. See, for example, the Legislative Branch Appropriations Act of 1979, § 304, J.S. App. 22a-23a). Fourth, the leaders of Congress acknowledged that the limitation could not be applied to federal judges.[12]

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[12] On the Senate side, one of the managers of the bill noted:

> We have a pay adjustment now of 12.9 per cent. Because of the failure to put on a pay cap, we have judges getting 12.9 percent for the rest of their lives. There is nothing we can do about that. *Id.* at §14486.

Finally, any other interpretation poses serious constitutional questions.

For these reasons appellees respectfully submit that neither the Salary Act nor the Adjustment Act were impliedly or explicitly repealed or amended by Pub. L. 95-391 or Pub. L. 96-86 and this Court need look no further to affirm the decision of the district court in this case.

III. If Pub. L. 95-391 or Pub. L. 96-86 had the effect of altering or amending the adjustments to which judges are entitled by law, these provisions are unconstitutional.

From all that is stated above it is clear that the limitation contained in Pub. L. 95-391 (October 1, 1978) and the roll-back provision found in Pub. L. 96-86 (October 12, 1979) could not have the effect of amending the Salary Act or Adjustment Act or of otherwise reducing judges' salaries. Appellees respectfully submit, however, that if these appropriations limitations are viewed as actual amendments to the aforesaid pay statutes, they would effect a reduction in judges' salaries and would result in an unconstitutional diminution in compensation.

With respect to the October 1, 1978 adjustment, the Solicitor General's theory is that because the proviso withholding funds to pay this increase was adopted one day prior to October 1, 1978, the adjustment was only

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[12] (Continued)

> [I]n the time we have debated this and been at loggerheads with the other body, we have found a situation where one branch of the Government has received a 12.9 percent increase in salary, and we will never lower that. *Id.* at §14487 (remarks of Senator Stevens).

"an expected increase" and "not part of the Judges' compensation." (J.S. 19) With respect to the October 1, 1979 adjustment, the Solicitor General acknowledges that this adjustment was more than an expectation. In fact, the "limitation" contained in Pub. L. 96-86 was not adopted by Congress until "11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for Judges." (J.S. p. 19 n. 11). As the legislation itself recites and the Solicitor General acknowledges, effective October 1, 1979, judges were "entitled to" and received a 12.9% adjustment over rates actually being paid, and this adjustment remained in effect until October 12, 1979 when their salaries were purportedly reduced. The Solicitor General defends this outright reduction on the theory that to establish a violation of Article III, § 1, judges must demonstrate that the reduction was part of a discriminatory scheme designed to encroach upon the independence of the Judiciary. Appellees respectfully submit that the right to a cost-of-living adjustment is an integral part of judges' compensation. It is not an inchoate or unenforceable "expectancy." Moreover, there is no requirement in the Constitution that to establish a violation of Article III, § 1 resulting from a direct diminution in compensation, judges must demonstrate some broad scheme to discriminate against them.

A. *The right to cost-of-living adjustments is a component of Judges' compensation.*

28 U.S.C. § 135 provides that "Each Judge . . . shall receive a salary at an annual rate determined under [the Federal Salary Act] as adjusted by [the Executive Cost-of-Living Adjstment Act.]"[13]

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[13] See p. 3 *supra*.

Under 28 U.S.C. § 135, the compensation of federal judges is defined as including *both* a base compensation under the Salary Act and an annual percentage adjustment under the Adjustment Act. Providing a statutory scheme for determining a judge's salary, and then declining to appropriate funds sufficient to pay the full salary so determined, including base compensation and the annual adjustment, unlawfully circumvents the prohibition of the Compensation Clause.

Appellant's argument that an adjustment is not a protected element of judges' salaries until it somehow vests on October 1 of each year with the receipt of a paycheck in an amount given by a *previously* submitted precise formula, is inconsistent with common sense and the entire history of Article III, § 1. This issue, we submit, was resolved 177 years ago in the very first reported case to consider the Compensation Clause, *United States* v. *More*, 3 Cranch 160 (Cir. Ct. D.C. 1803). At issue in that case was an act of Congress abolishing fees charged by federal justices of the peace. Judge More claimed that the law could not be invoked as to justices who took office at a time when such fees were lawful. The fees were payable when the services were rendered. Thus, the amount of fees any justice would receive in any year was unknown, or only an "expectancy." Nevertheless, the court held that as to sitting justices, the abolition of these fees was a diminution of compensation in violation of Article III, § 1.

The court below correctly recognized that Article III, § 1 obliges Congress to declare what the compensation of a federal judge shall be and further recognize

that Congress may do so by defining the salary component of a judge's compensation in terms of a specific formula. This is common, if not prevalent, in employment contracts, statutes and other provisions covering most of the American work force, executive and non-executive, including state and local government officers and employees. Hence, while the salary adjustment might not be paid out until October 1 of each year—a point upon which appellant so heavily relies—the entitlement to that adjustment "vested" with the enactment of the 1975 Executive Cost-of-Living Adjustment Act. The report annually submitted by the President to Congress establishes only the actual percentage *amount* of the cost-of-living adjustment for federal employees, based on the previous year's increase in the cost-of-living. The continuing right to the adjustment is provided by statute and protected by Article III, §1.

The Supreme Courts of Delaware and California recently addressed this question in interpreting their own constitutional prohibitions against the diminution of judicial salaries. Citing this Court's decision in *Booth* v. *United States,* 291 U.S. 339 (1934), the Delaware Court observed that the constitutional provision must logically "apply as well to a threat of removing the salary adjustment as the salary itself. . . ." *Stiftel* v. *Malarkey,* 384 A.2d 9 (Del.Sup.Ct. 1977). In that case, the Court considered the same arguments appellant advances here and answered:

> It is argued that a formula supplement like the one in this case is a "future" promise which can be revoked with impunity, whereas a stated salary increase

> would be legally different. We fail to see the basis for such a distinction. (384 A.2d 9, 15-16)

The Court viewed the cost-of-living adjustments *as a part of the judges' compensation* which may not be revoked.

In *Olson* v. *Cory* (p. 10, n. 7 *supra*) the Supreme Court of California affirmed a lower court decision holding unconstitutional an attempt by the California Legislature to place a limit on cost-of-living increases previously provided for judicial salaries. In holding that this legislation was in conflict with the constitutional provision prohibiting the diminution of judges' salaries, the Court stated:

> The primary purpose of that constitutional provision is to 'strengthen the independence of all three branches of the government,' including the judiciary. Security of both tenure and subsistence are important factors in creating and maintaining an independent judiciary. These factors are met by insuring relatively long, fixed terms of office (Cal. Const., art. VI, § 16; Gov. Code, § 71145) and foreclosing reduction in salary during term of office. Should the state arbitrarily limit the cost-of-living salary, the level of subsistence would be reduced. (Slip Opinion p. 15)

Appellees respectfully submit that the right to a cost-of-living adjustment is clearly a component of a judge's compensation. Any argument to the contrary is contradicted by the unequivocal statement by Congress, and the understanding of both the President and the Office of Personnel Management, in analyzing the October 1, 1978 adjustment. It is conceded that the adjustment became pay-

able after the appropriations restriction for that year expired on September 30, 1979. If appellant was correct —and consistent—the "nonvesting" of the fiscal 1979 adjustment by virtue of the restriction in the Appropriations Act would have *eliminated* the adjustment for that year, not postponed it. Yet, in 1979, Congress acknowledged that, judges "under existing law are *entitled* to approximately 12.9 percent increase in pay." Pub.L. 96-86, (J.S. App. 23a-26a) (Emphasis added). As previously indicated, the 12.9% adjustment represents the aggregate of the fiscal 1979 adjustment, payment of which was postponed by the appropriations restriction, and the fiscal 1980 adjustment which became effective October 1, 1979.

The law as to what constitutes diminution is not in dispute. No court has ever narrowed the protection of Article III, § 1 to the bare meaning of cash-in-hand. Congress has defined federal judges' compensation as "a salary at an annual rate determined under Section 225 of the [Salary Act], *as adjusted by* [the Adjustment Act]" (Emphasis added). Congress has left no doubt in its yearly enactments that the cost-of-living adjustment was always considered part of a judge's vested compensation, whether Congress would fund it or not. To hold otherwise would allow a massive flaw in the protective function of Article III, § 1. The opinion of the district court on this ground should be affirmed as clearly correct.

B. *To prove a violation of the compensation clause, Appellees do not have to establish a scheme to discriminate against judges.*

Appellant argues that if this Court agrees that the compensation of judges has been diminished the judgment below must still be reversed on the ground that a diminution in compensation of a federal judge is not unconstitutional unless it is part of a discriminatory scheme designed to encroach upon the independence of the judiciary. The opinion of the district court soundly rejected that proposition. It has never been held by any court that proof of a discriminatory animus is necessary to render a direct diminution of a federal judge's compensation unconstitutional.[14] The rule has always been, and *no* case stands to the contrary, that congressional action which reduces or withholds from a judge that to which he is entitled as compensation is, without more, unconstitutional. This Court so held in *Booth* v. *United States,* 291 U.S. 339 (1934).

The settting of *Booth* was a time of national economic peril much more serious than the current circumstances. During the Great Depression, the federal government considered it necessary to reduce the wages of its employees. This reduction was, at first, not applied to Article III judges. Congress itself recognized that such a

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[14] Only where the compensation of federal judges has been affected *indirectly* by circumstances constituting or involving a general burden of citizenship, has this Court or any court suggested such a prerequisite to a claim of unconstitutionality. See *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939) (general income tax); *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied.* 434 U.S. 1009 (1978) (inflation).

reduction would violate Article III, § 1. Accordingly, the Legislative Branch Appropriations Act of 1933, 47 Stat. 382, 402, section 197(5) provided:

> the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum.

This section accompanied other provisions in the same statute cutting the salaries of other federal employees, including Members of Congress, employees of the District of Columbia, mail carriers, etc. *See, e.g.,* Pub. L. No. 72-212, 47 Stat. 382, 401 (June 30, 1932), section 105.

The next year, more expenditure reductions were economically necesary. In the "Act to Maintain the Credit of the United States Government," Pub. L. No. 73-2, 48 Stat. 8 (March 20, 1933), pensions were reduced, and three months later, in an Act entitled "Fourth Deficiency Act, fiscal year 1933," Pub. L. No. 73-78, 48 Stat. 283 (June 16, 1933), the salaries of additional federal employees were reduced. Section 13 of that later act, 48 Stat. 283, 307, cut the retirement pay of federal judges by 15%. In the same statute, a host of other federal employees' salaries were reduced as well, in similar amounts. There was no discrimination.

Judge Booth, a retired federal judge whose salary had been purportedly reduced, brought suit against the United States. The Solicitor General argued that a *retired* judge was not entitled to the protection of his compensation under Article III, § 1. This Court ruled that retired judges were still entitled to the guarantee of Article III,

§ 1. The Court then considered the question of whether the diminution was unconstitutional. *The Solicitor General had conceded that if a retired judge was an Article III Judge, the diminution would be unconstitutional. This Court agreed*:

> In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction is in excess of that payable when the incumbent took office? *The answer must be in the affirmative.* Several courts, in well-considered decisions, have so interpreted analogous provisions of state constitutions . . . the Solicitor General with commendable candor admits that *a contrary construction would be subversive of the purpose of §1 of Article III.*

291 U.S. at 352. (Emphasis added)

If the prohibition against diminution were meant to contain the additional proviso hypothesized by the appellant, proscribing diminution of a judge's compensation only when accomplished as a result of discrimination, the Solicitor General would not have conceded otherwise in *Booth* and this Court certainly would not have ruled the challenged statute unconstitutional. The reduction in compensation at issue in that case was in the context of a *general cut in salaries for all federal employees, in the face of severe economic conditions.* The Court would, at least, have been forced to *inquire* into whether the 15% reduction in pay for retired judges was a discrimination calculated to interfere with their independence. No such question was even asked. Had it been, the response would clearly have been negative. Obviously, it was considered irrelevant.

This has been obvious to the Congress as well. As noted above, the Legislative Branch Appropriations Act of 1933, 47 Stat. 382, 402, which lowered federal employees' salaries during the Depression, contained the proviso, "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." 47 Stat. 382, 402, Section 197(5).

And in the precise statutory context of this case, the Adjustment Act (which requires that federal judges' salaries be adjusted in the same manner as the salaries of General Schedule employees), specifically exempts federal judges from comparability with the General Schedule on those occasions when such adjustments are downward. Section 461(b) of Title 28, United States Code, states that the Act "shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III . . . be diminished during such individual's continuance in office."

Congress would not have enacted the statutory provisions which excluded the reduction of judges' salaries from a general reduction in the pay of all other federal employees, had it shared the views expressed here by appellant. (Nor would the Solicitor General have conceded the point in *Booth,* were it not for his recognition that "a contrary construction would be subversive of the purpose of §1 of Article III," 291 U.S. 352.)

In sum, both Congress and this Court have consistently held that a direct diminution in the compensation of a federal judge is prohibited, regardless of whether other

federal employees' compensation is likewise reduced.[15] The only exception to this absolute prohibition against diminution has been in the case of an indirect diminution, imposed upon judges by the effect of a common duty of citizenship.

Appellant's suggestion that the compensation of Article III judges may be diminished so long as there is no discrimination, finds no support in judicial decision or congressional action. The motion to affirm may be granted as to this contention on the direct authority of *Booth* v. *United States,* as well as the entire history of the Compensation Clause.

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[15] The records of the Constitutional Convention support this principle in another respect, as well. The debates and documents of the Convention reflect a concern for the independence of the federal judiciary in the context of insuring against "undue complaisance" by the courts in favor of the legislature when members of the legislative had cases in Court. 2 M. Farrand, *The Records of the Constitutional Convention* 1787, at 44-45 (remarks of J. Madison). It was Madison's view that the temptation to a judge could only be insured against by proscribing both increases and decreases during the judge's term of office. The Convention, however, insisted that a judge serving a life tenure would require upward adjustments in his compensation. But the Convention did enact the prohibition against diminution which, Madison had contended, represented the more serious situation for possible "undue complaisance."

This effort to remove, as far as practicable, the circumstances under which judges might be encouraged to exercise undue complaisance toward the legislature is not advanced by considerations of discriminatory motives.

CONCLUSION

Appellees respectfully move that this Court affirm the judgment entered in this cause by the district court. In the alternative, appellees respectfully submit that the Court should hold this Motion until the disposition of the Appeal in No. 79-983. If the decision of the lower court is affirmed in that appeal, further argument of this case will be unnecessary and this Motion to affirm may be granted summarily.

Respectfully submitted,

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